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No. 393

# In the Supreme Court of the United States

OCTOBER TERM, 1960

CHENG FU SHENG AND LIN FU MEI, PETITIONERS

*v.*

WILLIAM P. ROGERS, ATTORNEY GENERAL OF THE UNITED STATES

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

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### OPINIONS BELOW

The opinion of the court of appeals (Pet. 21–24) is not yet reported. The opinion of the district court (Pet. 26–33) is reported at 177 F. Supp. 281.

### JURISDICTION

The judgment of the court of appeals was entered on June 10, 1960. The petition for a writ of certiorari was filed on September 7, 1960. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

### QUESTIONS PRESENTED

1. Whether an alien may be deported to Formosa under Section 243(a) of the Immigration and Nationality Act.

2. Whether a warrant of deportation must specify the place to which an alien is to be deported when hearings and other proceedings have clearly apprised the alien of the place to which he is to be sent.

## STATUTES AND REGULATIONS INVOLVED

Section 243(a) of the Immigration and Nationality Act, 8 U.S.C. 1253(a), and 8 C.F.R. § 243, are printed in the Appendix, *infra*, pp. 12–16.

## STATEMENT

The facts in this matter are not disputed.[1]

Petitioners were Chinese Nationalist Air Force officers who entered the United States from Formosa in 1952 and 1953 to receive military training with the United States Air Force (Pet. 6). Petitioners remained in the United States following the completion of their military training (Pet. 6). In December 1953, warrants were issued ordering their deportation on grounds of failure to maintain nonimmigrant status (R. 4–6). The warrants did not specify the country to which petitioners were to be deported, but by stipulation of the parties it was agreed that it is the intention of the Attorney General to deport petitioners to Formosa, and that the Government of the Republic of China has agreed to accept petitioners into its territory (Pet. 7).

Petitioners challenged the deportation action on the grounds that they were entitled to relief under Section 6 of the Refugee Relief Act of 1953, 50 U.S.C.

[1] A detailed statement of facts is found in *Cheng Fu Sheng* v. *Barber*, 269 F. 2d 497 (C.A. 9), an earlier appeal by petitioners to the Ninth Circuit.

App. 1971(d), because they feared persecution if they were returned to Formosa. The Ninth Circuit reversed a decision of the District Court adverse to petitioners, *Cheng Fu Sheng* v. *Barber*, 144 F. Supp. 913 (N.D. Cal.), and held them entitled to such relief. 269 F. 2d 497. Execution of the deportation warrants was withheld pending determination by the Congress of petitioners' applications for permanent residence under Section 6 of the Refugee Relief Act of 1953 (R. 4–6). The application was denied in September 1959 (R. 4–6).

Petitioners then brought action in the District Court for the District of Columbia for a declaratory judgment (R. 3–7) challenging the deportation warrants on the ground that Formosa is not a country within the meaning of Section 243(a) of the Immigration and Nationality Act, 8 U.S.C. 1253(a) (Pet. 6). It was stipulated by the parties that no treaty or other agreement purported to transfer the sovereignty of Formosa to China (Pet. 7).

On cross motions for summary judgment, the District Court granted summary judgment for petitioners (Pet. 33; 177 F. Supp. at 285). The court relied on a statement of United States policy with respect to Formosa printed in 39 Dept. State Bull. 1005, 1009 (1958), and emphasized the following portion (Pet. 30; 177 F. Supp. at 284):

> It has * * * been pointed out that under the Japanese Peace Treaty Japan renounced all right, title, and claim to Formosa. However, *neither in that treaty nor in any other treaty has there been any definitive cession to China of*

> *Formosa. The situation is, then, one where the Allied Powers still have to come to some agreement or treaty with respect to the status of Formosa.* (Emphasis supplied.)

The court went on to hold (Pet. 31; 177 F. Supp. at 284):

> The conclusion seems inescapable to this Court that since under existing law; deportation may be effected only to a specific country, in this instance China, and since Formosa is not regarded by the Department of State as part of China as a country, the plaintiffs may not be deported to Formosa. Manifestly, as has been shown heretofore in this matter the Court must be bound by the official attitude of the Department of State, which apparently has been studied very carefully and expressed in guarded phraseology. It is even conceivable that for the Court then to regard Formosa as part of China for any purpose and thus go beyond the expressions of the Department of State, might cause embarrassment or complications insofar as the Department is concerned.

On appeal by the Attorney General, the Court of Appeals for the District of Columbia Circuit reversed the District Court, saying (Pet. 23, 24):

> Since Formosa is a well-defined geographical, social and political entity and since there is a government on Formosa which has undisputed control of the island, we think it is a "country" within the meaning and purposes of the statute. This construction comports with Congress' evident purpose to reduce the number of "undeportables" by increasing the number of places to which an alien under a final

order of deportation may be sent. To hold otherwise would open to doubt the Attorney General's power to deport aliens to areas of the world where diplomatic status is unsettled, such as various trusteeships, protectorates or colonies.

* * * * *

Since we conclude that the word "country" as used in § 243(a) is not limited to national sovereignties in the traditional diplomatic sense; see *United States ex rel. Moon* v. *Shaughnessy*, 218 F. 2d 316 (1954), the possibilities of foreign affairs embarrassment which the District Court feared do not arise. Nor does this construction involve judicial intervention into political matters entrusted to the Executive and Legislative Branches. The judgment is accordingly reversed and the case is remanded to the District Court with directions to grant summary judgment for the appellant.

## ARGUMENT

1. Petitioner contends that the fact that the State Department has said that no definitive cession of Formosa to China has been made means that Formosa cannot be considered a country for the purposes of Section 243(a) (Pet. 11–15). Petitioners do not claim that they have any right to remain in this country; nor do they deny that they entered this country from Formosa. They do not deny that the United States recognizes the government in control of Formosa as the government of the Republic of China; rather, they urge that, without definitive cession of the territory of Formosa to the government of the Republic of China, Formosa cannot be considered a country.

This Court has said that in immigration legislation the term "country" is not a technical or artificial one, and the sense in which it is used must be determined by reference to the purpose of the legislation. *Burnet* v. *Chicago Portrait Co.*, 285 U.S. 1, 6–7.

It is the purpose of the deportation statute to remove from this country aliens who are here unlawfully. *Delaney* v. *Moraitis*, 136 F. 2d 129 (C.A. 4). The power of the government to terminate an alien's stay in this country is clear. *Harisiades* v. *Shaughnessy*, 342 U.S. 580. Once an alien has been found to be in this country unlawfully, Section 243(a) of the Immigration and Nationality Act provides various places to which the alien may be sent, primarily those countries with which the alien has had some contact. The provision in the statute for nine alternative places of deportation evidences an intention on the part of the Congress to eliminate the possibility that deportation will be frustrated by reason of a lack of statutory authority to deport to certain areas.

In light of the purpose of Section 243, the word "country" as used therein requires only that the place to which the alien is to be deported be a defined social or geographical entity with sufficient control over the area to receive or reject the alien.[2] As the court

[2] It is far from clear that, for the purposes of the Immigration and Nationality Act, a government must have territory over which it has control at the time of the deportation. The rationale of the Fourth Circuit in permitting deportation to the Greek government in exile during World War II is apposite to the present case. There, the court said, in *Delaney* v. *Moraitis*, 136 F. 2d 129, 131:

> * * * If the word "country" as used in the statute be construed to include the government in exile of a country

below points out: "To hold otherwise would open to doubt the Attorney General's power to deport aliens to areas of the world where diplomatic status is unsettled, such as various trusteeships, protectorates or colonies" (Pet. 23). If an excluded alien came to the United States directly from Formosa, he would hardly be in a position to claim that Formosa was not "the country whence he came" and therefore the country to which he should be returned under Section 237(a) of the Immigration and Nationality Act, 8 U.S.C. 1227(a). There is no reason why "country" should be read in any more limited sense under Section 243(a).

Since the Republic of China is in full and effective control of Formosa and can assure this government that petitioners will be received there, the requirements of Section 243(a) are met. Whether there

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whose territory has been overrun by the common enemy, the purpose of the statute can be carried out and the alien placed under the jurisdiction of the country to which he owes allegiance and which is charged with his protection. If it be construed as limited to the territory of the nation, which has been thus overrun, the purpose of the statute will be frustrated in cases of this sort; and it will result either that we must suffer an alien who has come from such a country to remain at large in our country contrary to our laws or must support him in prison until such time as he can be returned to the territory now in possession of the enemy. We do not think that any such absurd result could have been within the contemplation of Congress in the passage of the Act; and it is well settled that statutes should be construed, if possible, so as to effectuate the purpose intended and avoid absurd consequences. * * *

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has been formal diplomatic recognition of China's hegemony over Formosa is immaterial so long as there is a government capable of entering into an agreement to accept petitioners. See *United States ex rel. Tom Man* v. *Murff*, 264 F. 2d 926 (C.A. 2).

The Department of State has designated Formosa as the territory of the Republic of China for the limited purposes of the Mutual Defense Treaty Between the United States and the Republic of China. See Mutual Defense Treaty, Arts. II, VI; in 31 Dep't State Bull. 899 (1954). In addition, the Congress, in considering the application of petitioners for permanent residence under the Refugee Relief Act of 1953, made it clear that it considered Formosa to be a country. *Opposing the Granting of Permanent Residence in the United States to Fu Sheng Cheng and Fu-Mei Lin*, H. Rep. No. 1176, 86th Cong., 1st Sess. (1959). After stating that the purpose of the accompanying resolution was to express disapproval of granting permanent residence status to petitioners, and reviewing the circumstances under which the application for such status arose, the report concluded p. 8:

> * * * It is the committee's considered opinion that to agree that any national of a *country* allied with the United States in the mutual defense effort could be granted permanent residence in the United States on the ground that he considers himself a refugee from his own *country*, would be highly injurious to the conduct of foreign relations of this country and the very structure of our alliances as expressed in the various mutual security treaties and arrangements. Moreover, the committee does not

> believe that any national of a *country* of the free world allied or associated with the United States in a common effort designed to stem the tide of Communist tyranny may be considered a refugee within the meaning of this term as it is used in the laws of the United States [emphasis added].

Subsequent to the institution of this action, other courts have considered the question whether Formosa is a "country" to which an alien may be deported and are unanimous in their determination that Formosa is a country within the meaning of Section 243(a) of the Immigration and Nationality Act. See *Chan Chuen* v. *Esperdy* (S.D.N.Y., No. 153–159, order filed March 17, 1960, oral opinion rendered February 2, 1960) (R. 31–34); *Chao-Ling Wang* v. *Pilliod* (N.D. Ill., No. 58 C. 1427, order dated February 19, 1960) (R. 35–36); *Peter Ying* v. *Rogers*, 180 F. Supp. 618 (D. D.C.). Courts faced with cognate questions have also held that Formosa is a country.[3] See *Bank of China* v. *Wells Fargo Bank & Union Trust Co.*, 104 F. Supp. 59 (N.D. Cal.):

There is no merit in petitioners' assertion that recognition of Formosa as a country for purposes of deportation will be an invasion of an area of political decision making. The determination of what is a "country" for the purposes of the United States im-

[3] If Formosa is a "country" for the purposes of Section 243(a), as the court of appeals below held, petitioner's course is not aided by his argument (Pet. 16–17) that the former statute provided for deportation to the country or foreign port whence the alien came, whereas the present statute refers to the country in which the port of embarkation is situated. The deportation to Formosa is deportation to a country.

migration statute does not affect the determination of the status of Formosa in other fields. And since, as noted, the Department of State has recognized Formosa as territory of China for purposes of defense, recognition of control of Formosa by the government of the Republic of China for the limited purpose of effecting deportation to Formosa is not in conflict with the policy of the Department of State.

2. Petitioners attack the deportation warrants on the ground that they do not specify the country to which petitioners are to be deported (Pet. 18–19). Petitioners do not deny that they knew that it was the intention of the Attorney General to deport them to Formosa. Indeed, during the administrative proceedings with respect to petitioners' application for withholding of deportation, petitioners demonstrated such knowledge by introducing testimony to show that they feared persecution if returned to Formosa (R. 5–6).

Neither the statute nor the regulations require that the country of deportation be named in the warrant where the deportee is fully informed of the place to which he is to be sent. Cf. *Namkung* v. *Boyd*, 226 F. 2d 385 (C.A. 9); *United States ex rel. Eichenlaub* v. *Watkins*, 167 F. 2d 659, 660 (C.A. 2), affirmed, 338 U.S. 521; *Seif* v. *Nagle*, 14 F. 2d 416, 417 (C.A. 9), certiorari denied, 273 U.S. 737. The regulations require only that a final order issue and that the country of deportation be designated under authority of Section 243 of the Act. 8 C.F.R. § 243.1.

The warrant of deportation issues after it has been finally determined administratively that the alien is deportable. At that time the country of deportation cannot be authoritatively known since the alien has the right to make a choice of the country to which he wishes to be sent, and it must be determined whether the country chosen, or one of the other countries specified in Section 243(a), will accept him. When, as here, a determination has been reached that the alien will be sent to a particular country, he is given notice of the country to which he is to be sent. So long as the hearing is fair and the petitioners reasonably informed of the place of deportation, they cannot be prejudiced by the absence of the specification of the place of deportation in the warrant. See *Lezos* v. *Landon*, 235 F. 2d 581, 583 (C.A. 9).

## CONCLUSION

The decision below is correct and the petition for a writ of certiorari should be denied.

Respectfully submitted.

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OCTOBER 1960.

## APPENDIX

Section 243(a) of the Immigration and Nationality Act, 8 U.S.C. 1253(a) provides:

> The deportation of an alien in the United States provided for in this chapter, or any other Act or treaty, shall be directed by the Attorney General to a country promptly designated by the alien if that country is willing to accept him into its territory, unless the Attorney General, in his discretion, concludes that deportation to such country would be prejudicial to the interests of the United States. No alien shall be permitted to make more than one such designation, nor shall any alien designate, as the place to which he wishes to be deported, any foreign territory contiguous to the United States or any island adjacent thereto or adjacent to the United States unless such alien is a native, citizen, subject, or national of, or had a residence in such designated foreign contiguous territory or adjacent island. If the government of the country designated by the alien fails finally to advise the Attorney General within three months following original inquiry whether that government will or will not accept such alien into its territory, such designation may thereafter be disregarded. Thereupon deportation of such alien shall be directed to any country of which such alien is a subject national, or citizen if such country is willing to accept him into its territory. If the government of such country fails finally to advise the Attorney General or the alien within three months following the date of the original inquiry, or within such other period as the Attorney General shall deem reasonable under the circumstances in a particular case, whether that

government will or will not accept such alien into its territory, then such deportation shall be directed by the Attorney General within his discretion and without necessarily giving any priority or preference because of their order as herein set forth either—

(1) to the country from which such alien last entered the United States;

(2) to the country in which is located the foreign port at which such alien embarked for the United States or for foreign contiguous territory;

(3) to the country in which he was born;

(4) to the country in which the place of his birth is situated at the time he is ordered deported;

(5) to any country in which he resided prior to entering the country from which he entered the United States;

(6) to the country which had sovereignty over the birthplace of the alien at the time of his birth; or

(7) if deportation to any of the foregoing places or countries is impracticable, inadvisable, or impossible, then to any country which is willing to accept such alien into its territory.

8 C.F.R. § 243 provides in pertinent part:

§ 243.1 Issuance of warrants of deportation; *country to which alien shall be deported; cost of detention; care and attention of alien*—(a) *Issuance.* A warrant of deportation shall be based upon the final order of deportation and shall be issued by a district director or an immigration officer acting for him.

(b) *Determination of place and cost of deportation, and necessity for attendants.* District directors shall exercise the authority contained in section 243 of the Immigration and Nationality Act to designate the country to which, and at whose expense an alien in the United States shall be deported, and to deter-

mine when an alien's mental or physical condition requires the employment of a person to accompany the alien.

* * * * *

§ 243.3 *Execution of warrants of deportation*—(a) *Taking alien into custody.* Upon the issuance of a warrant of deportation or as soon thereafter as the circumstances of the case require, the alien, if not in the physical custody of the Service, shall be taken into such custody under the authority of such warrant of deportation and deported.

(b) *Stay of deportation.* (1) Except as otherwise provided in this part, the district director having administrative jurisdiction over the place where the alien is located may, in the exercise of his discretion, and for good cause shown, stay the execution of a warrant and order of deportation for such time and under such conditions as he may deem appropriate. He may grant such stay upon his own instance, or upon request of the alien. A request for a stay by the alien shall be in writing, shall be filed with the district director, and shall be supported by an affidavit setting forth the reasons for the request and by such other evidentiary matter as may support the request.

(2) If the request for a stay of deportation is predicated upon a claim by the alien that he would be subject to physical persecution if deported to the country designated by the Service, he shall be requested, upon notice, to appear before a special inquiry officer for interrogation under oath. The alien may have present with him, at his own expense, during the interrogation any attorney or representative authorized to practice before the Service. The alien may submit any evidence in support of his claim which he believes should be con-

sidered by the special inquiry officer. Upon completion of the interrogation, the special inquiry officer shall prepare a written memorandum of his findings and a recommendation which shall be forwarded to the regional commissioner together with all the evidence and information submitted by the alien or which may be applicable to the case. The alien shall be served with a copy of the special inquiry officer's memorandum and recommendation and shall be allowed five days from date of service within which to submit written representations to the regional commissioner. If the alien refuses to appear for interrogation before a special inquiry officer when requested to do so or waives his appearance, all the pertinent evidence and available information in the case shall immediately be submitted to the regional commissioner. The decision whether to withhold deportation and, if so, for what period of time shall be finally made by the regional commissioner upon consideration of all the evidence submitted by the alien and any other pertinent evidence or available information.

(3) Notice of disposition of the alien's request under subparagraph (1) or (2) of this paragraph shall be served upon him, but neither the making of the request nor the failure to receive a notice of decision thereon shall relieve or excuse the alien from presenting himself for deportation at the time and place designated for his deportation. No appeal shall lie from a denial of a request for a stay of deportation, but such denial shall not preclude the Board from granting a stay in connection with a motion to reopen or a motion to reconsider as provided in § 6.21(a) of this chapter.

(c) *Permission to depart when ordered deported.* A district director may, in his discretion, permit an alien who has been ordered deported to depart himself from the United States at his own expense and to a destination of his own choice. Any alien who has so left the United States is considered to have been deported in pursuance of law.

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